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AUTHOR Blumer, D. H.
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ABSTRACT

This document describes the criminal and legal liability of community college presidents and board members in such areas as contracts, civil rights, and fiduciary responsibilities. Also described are the defenses which universities ordinarily build to protect their employees from these liabilities. These defenses include the sovereign or charitable immunity provided to some public institutions, the possibility of offering indemnity to convicted college officials, and the provision of insurance coverage to college officials. Suggestions for limiting liability include: an assessment of the risk, the availability of legal counsel trained in college law, and the purchase of whatever insurance is available. (NHM)

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WASHINGTON HILTON HOTEL

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FORUM 6: Legal Liability of Community College Presidents and Board Members

Remarks by D. H. Blumer

DRAFT

The legal liability of officers and trustees of colleges and universities is a very popular topic these days. But it is not a new one. There are cases on the books dealing with the issues surrounding such legal liability from as early as the turn of the century. What is new is not the fact of such legal liability, but rather its nature, the scope of such liability, and the outcome of suits.

Faculty members of institutions have long been liable for their acts. This is especially true of faculty members engaged in the supervision of hazardous activities such as athletics and laboratory classes. But since this is a liability which is not new, institutions have had a chance to develop protections for their employees either through insurance or indemnity. Alternatively, professional associations have developed group life insurance policies covering such liability. They have been able to do so because over the years the risks involved have become calculable and therefore in-

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surance companies have been willing to write policies.

As we will be discussing, this situation is a little bit different from the topic before us today.

Before I forget, let me mention that my remarks will in many respects parallel some statements made in a recent publication of the American Association of Community and Junior Colleges. That publication is Briefing Papers I of Legal Issues in Post-Secondary Education. This publication was sent out to all member institutions of AACJC in November. It contains two articles which are relevant to our discussion here today: "The Legal Liability of Administrators and Trustees" and "The Legal Liability of Faculty." Let me take a moment to talk a bit about this publication. Its purpose was not in any way to replace local legal counsel. Rather, the topics chosen and the treatment of the articles were specifically designed to provide the background that administrators need in certain technical legal topics in order to get their everyday job done. By reading these two articles, as well as the other articles in the book, I believe that you will have sufficient background in these areas in order to make more precise judgments about when to consult legal counsel.

A second volume, Briefing Papers II, is now out. Those of you who have not seen your institutional copy, or would like a personal copy, can purchase them while they are still

available from AACJC. I am plugging them, not because I get any royalties from them--I don't--but because I think that they contain articles which are very relevant to each of your jobs. Each article is not so detailed as to require a big expenditure of time, but each is detailed enough to give you some substantial background. We have touched on other items besides legal liability, of course. Topics include: Legal Issues in Appointments, Promotions and Tenure; Copyright on the Campus; Legal Issues in Personnel Records Policies; Dealing with Federal Regulatory Agencies; Free Speech on the Campus; and so on.

The case which brought the issues of legal liability of trustees and college presidents to the fore is, of course, the Brookdale case. But legal liability is a broader subject than that covered by Brookdale. My approach today will be as follows. I am going to attempt to outline the major areas where liability can occur. I would also like to outline the defenses which universities ordinarily build to protect their employees from this liability. Finally, I'd like to make some suggestions for how you should proceed to protect yourself. These suggestions carry no guarantees. But I think they will be helpful.

The Brookdale case and one or two other cases, such as the Sibley Hospital case, have made the issue of legal liability very prominent. But I'm not convinced that there is

an unusual amount of legal activity in this area at this time. What these cases portend is the increased potential for liability. In my own institution we do have one or two cases pending, the most prominent of which involves a suit for $400,000 against my boss and others. The issue? Whether the failure to promote an associate professor to full professor involved unlawful sex discrimination.

It seems to me that the greatest danger these cases hold for continuing good management of institutions is the vulnerability which middle managers and others now feel. I detect in my own institution a reticence on the part of a few department chairmen and deans to move quickly in sticky situations which may involve risk to themselves. It is further my subjective impression that there is a tendency to kick decisions upstairs, a tendency to avoid the risk, and perhaps a feeling that the institution has not provided protection and support to these middle managers which is commensurate with the responsibilities they are being asked to shoulder. In institutions which wish to foster some measure of departmental autonomy and collegial judgment, this attitude is disastrous. In my view, therefore, it is absolutely essential that institutions do provide maximum support and protection for all administrators and trustees who, after all, wish nothing more than to act reasonably and prudently to do their job without unreasonable threat of personal financial disaster. It seems a small enough request.

It is also true in my view that, in the absence of adequate protection against legal liability, officers and employees may become overly legalistic, depending too much on lawyers for decisions which most properly should be made by academic administrators. Proper protection and support will help to avoid this pitfall as well.

Public vs. Private Institutions

At the outset we should make a distinction between public and private institutions. The vast majority of community and junior colleges are, of course, public. This distinction is important in determining what, if any, immunities the institution and its employees have by law against liability for suit. At common law charitable organizations were protected by charitable community. This immunity protected organizations engaged in charitable enterprises from liability for suit during the reasonable pursuance of their charitable activities. Without going into great detail, let me say simply that this doctrine has been substantially eroded in recent years.

However, the doctrine of sovereign immunity is still a viable doctrine. This doctrine simply says that government agencies and certain government officials in the pursuance of their duties are immune from suit. It derives from medieval

Anglo-Saxon law. In medieval times the king was the fountainhead of all law. Executive officers and the courts all derived their power from the king. The argument, therefore, went that the king could not sue himself. Furthermore, a king with divine right could do no wrong.

Substantial remnants of this doctrine remain in many states. In other states it is abolished or altered by statute. Thus, for example, government officials in California are not covered by sovereign immunity for their wrongful acts. Lower officials in Kansas and Georgia are not covered when they act for an improper purpose. In Maryland, only certain higher officials are covered. Curiously enough, public officials in Maryland who take an oath of office and bear a commission, such as police officers, are also covered, however.

It is impossible to make a generalization which is applicable to the situation in every state. The breadth and depth of sovereign immunity varies greatly. It varies not only among states, but within states. For example, many states accept the doctrine that sovereign immunity for municipal organizations and officials is less than that for their state counterparts. It is said that in municipal agencies only governmental acts are covered, not proprietary acts. Governmental acts are defined as those which are intimately

associated with the governmental process, such as law enforcement. Proprietary acts are those which produce a profit and are not ordinarily associated with the governmental function. An example of a proprietary activity would be a state-run store in a public building.

It should be stated that sovereign immunity is a dying concept. There are strong arguments against it in this modern day. It leaves the victim without a recourse. At Maryland, for example, I feel great reluctance at having to tell victims that they have no recourse to the University, by law. Recently, for example, a student fell through a grating in a dormitory building and was killed. The University was precluded in helping in any way, although it was clearly negligent. We see a dozen or more cases like this every year.

Obviously, however strong the concept of sovereign immunity might be in your state, it should never be an excuse for lowering the standard of care that you take in completing your assigned duties.

I would now like to briefly review the key areas of potential liability for administrators and trustees.

Contracts

One area which can possibly lead to personal liability is the area of contracts. Yet adequate management care should avoid this contingency entirely. As long as one routinely

signs contracts in the clear capacity of an agent, and not in his personal capacity, he should avoid personal liability on contracts. In the article on legal liabilities of administrators and trustees in Briefing Papers, some suggested language to avoid personal liability on contracts is given. I would refer you to page 13.

Tort Liability

Tort liability is perhaps the most familiar kind of liability. A tort is a civil--as opposed to a criminal--wrong against another. Thus, for example, a simple robbery could give rise to two trials, a criminal one for the crime of robbery, and a civil one for the civil tort of assault or for conversion of money.

In the college context potential tort liability can be found in the science lab, on the athletic field, in public hallways, or in a thousand other areas where civil wrongs may be committed.

Civil Rights

Many of us have heard of what are termed "1983 suits." These suits stem from Congressional acts which were passed after the Civil War to protect the newly won rights of freed slaves. However their language is quite broad and covers

civil rights in general. Of special importance is that these acts provide for monetary damages for the violation of constitutional rights. The suits derive their names from the citation in the United States Code where the relevant laws are found--42 USC, Section 1983. It is these suits which have brought perhaps the bulk of the publicity in recent years surrounding the legal liability of administrators and trustees.

Fidicuary Liability

The final major area which provides potential for legal liability for trustees and administrators is a potential breach of their fiduciary responsibilities. Fiduciary duties are those special responsibilities which are placed upon trustees and administrators by virtue of their jobs. The extent of these duties will vary from state to state Some institutions of higher education are legal corporations. My own is a corporation, in addition to being a state agency. As such, the Regents of the University of Maryland are held to a standard of care which is lower than that of trustees of a trust. Directors of corporations are ordinarily held liable

only in relatively egregious situations. They cannot ordinarily be liable for

simple mistakes in business judgment. They can, however, be liable, for example, when they profit from personal dealings with the institution.

Criminal Liability

I suppose it would be necessary also to mention the category of criminal liability. Certainly no administrator or trustee should ever be in the position of being liable for a criminal act. And it is easy to avoid this predicament. Crimes almost universally require criminal intent. A trustee or administrator who acts reasonably and in good faith will avoid criminal liability.

I would now like to turn our discussion to the major kinds of protections which are available to trustees and administrators in all these areas are potential liability.

Indemnity

At the beginning of my remarks, I mentioned that I felt it was imperative that institutions should provide proper protections and support against personal liability to its trustees and administrators acting in good faith. One of the traditionally

most common methods of providing such protection is indemnity. Indemnity in this context simply means that the institution would pay all costs incurred by the trustee or administrator as a result of his acts. The problem with indemnity as it is ordinarily used, is that it requires an affirmative finding that the person is worthy of indemnification in the particular situation. This may be cold comfort since the protection is not certain. For example, the State of Maryland provides by statute that colleges and universities may petition the State Board of Public Works for money to pay damages of employees who incur such damages while completing duties within the scope of their employment. While the protection is potentially rather complete, it is still a protection which is potential in nature.

Insurance

The preferable protection would be insurance. The biggest problem with this protection is the lack of adequate policies presently available. Certainly there are policies which adequately cover tort liability. But the area of liability for violation of constitutional rights is such a new area that it is very difficult to find a policy or an underwriter who will write a policy which is relatively complete in its coverage. Some professional organizations, such as the American Association of School Administrators have attempted to write a group policy which covers administrative

liabilities at most times. Nevertheless, problems remain, and I believe will continue to remain, until such time as insurance companies can properly assess the risks. This will only come after we have more complete experience with how courts will handle these new areas.

Some Suggestions

What are administrators and trustees to do in the meanwhile? I would suggest the following.

The first order of business is to assess your risk. You should ask your college attorney for a detailed explanation of the extent of sovereign immunity or charitable immunity in your state. You should ask him also concerning any statutes or regulations having to do with indemnity of state officials. If you are without adequate coverage or protection, you should explore the possibility of liability insurance. There are several books put out by national higher education associations which can help guide you and your staff in this area. A book written in 1972 called The Management of Risks in Institutions of Higher Education, is available from the National Association of College and University Business Officers. A relatively definitive work on insurance in this whole area by the same author as the book just mentioned will be available in June, published by the Association of American Colleges.

You will find the process of insuring your officers and managers an expensive one, and possibly not a complete protection.

Some other advice is in order. You should have the availability of legal counsel who is familiar with the special areas of college law. This is no longer a luxury, but a necessity for administrators and trustees in higher education. You should take certain precautions in your everyday work. Most of these are a matter of common sense. George Shur in his article in the Briefing Papers on legal liability of faculty, lists some of them. He mentions, for example, that when dealing with a hot issue it is wise to have a third party present. In the alternative a memo to the file written after the meeting may prove to be useful. He points out that almost no conversations or memos are private or confidential. Almost everything is subject to subpoena, and conversations may be quoted in a trial as an admission against you.

Another good rule of thumb is to have legal counsel review all contracts before their execution. This may seem cumbersome. However, most contracts fall within the certain specific areas, and review can usually be done quickly. In some cases standard contracts could be used and review may not be necessary. Because of the fastbreaking nature of legal issues in higher education, it is wise to have senior administrators meet periodically in a seminar with legal counsel.

At that time counsel can review new developments and can discuss continuing problems of general interest.

Perhaps the best advice that one can give to an administrator or trustee is to be a "reasonable" person. If in all your acts you act reasonably, prudently and in good faith, you minimize the chances of suit and maximize the chances of winning those suits which are actually instituted against you. While at times it may be a temptation to act quickly, or even perhaps in anger, it is best to count to ten, or even to sleep on it. Perhaps one piece of good advice in this vein is to use Abraham Lincoln's technique. When deeply angered by some insult or by someone's mistake, he would immediately write the letter he wanted to send. He would then wait one day. His anger having cooled, he would write a second letter, destroy the first, and send the second. This technique had the advantage of saying what he wanted without having to pay for it.

Summary

Most of my experience is with institutions with large enrollments. What this has meant is that the superiors for whom I work are constantly being named defendants in suits. Indeed they may be defendants in as many as four or five suits at any given time. Since the University of Maryland has at present in excess of 20 active suits against it, and

that number is not atypical for large institutions, the possibility of suit is not a mere potential one.

Nevertheless, if damages are awarded, the state has indemnified--in most cases of which I am aware. Any other recourse would be an unbearable one. So, the risk may not be quite as great as it seems.

In short, then, administrators face yet another and new risk. We are in a time of transition, and therefore it is a particularly uncomfortable time. Yet we must ride with the waves, and work to develop adequate protection for our trustees and administrators. In the meantime, it is incumbent upon us to continue to move with our ordinary prudence and good faith and that, perhaps more than indemnity, insurance, or other devices, will serve us in good stead as a protection and support.

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